

Decision 01-10-008 October 10, 2001

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking into the Operation of Interruptible Load Program Offered by Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company and the Effect of these Programs on Energy Prices, Other Demand Responsiveness Programs, and the Reliability of the Electric System.

Rulemaking 00-10-002  
(Filed October 5, 2000)

**OPINION ON REQUEST FOR INTERVENOR COMPENSATION**

**I. Summary of Award**

The Utility Reform Network (TURN) is awarded \$32,259<sup>1</sup> for its substantial contribution to Decision (D.) 01-04-006 pertaining to the Phase I issues of direct load control, opt-out provisions, and new program design. This award is \$177 more than the \$32,082 award requested by TURN due to the most recent hourly rate authorized to TURN's attorney Hawiger for his work in 2000.

**II. Background**

By D.01-04-006, dated April 3, 2001, we adopted improvements to the interruptible tariffs and rotating outage programs of Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE) to improve the reliability of California's

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<sup>1</sup> All amounts are rounded up to the nearest dollar.

electric system for the near term, particularly for the summer of 2001. That decision also provided a broad range of short-term and mid-term tools to help California get through the challenges of the immediate future, while additional steps are taken elsewhere to implement a more comprehensive response to the energy situations that Californians now face.

Of the parties participating in the first phase of this proceeding, only TURN seeks compensation for its participation.

### **III. Requirements for Award of Compensation**

An intervenor who seeks compensation for his or her contributions in Commission proceedings must file a request for compensation pursuant to §§ 1801-1812.<sup>2</sup> Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference (PHC) or by a date established by the Commission. The NOI must present information regarding the nature and extent of the customer's<sup>3</sup> planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may also request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding.

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<sup>2</sup> All statutory references are to the Public Utilities Code unless otherwise stated.

<sup>3</sup> To be eligible for compensation, an intervenor must be a customer as defined by § 1802(b). In D.98-04-059 (footnote 14) we affirmed our previously articulated interpretation that compensation be proffered only to customers whose participation arises directly from their interest as customers. (See D.88-12-034, D.92-04-051, and D.96-9-040.)

Under § 1804(c), an intervenor requesting compensation must provide “a detailed description of services and expenditures and a description of the customer’s substantial contribution to the hearing or proceeding.” Section 1802(h) states that “substantial contribution” means that,

“in the judgment of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable cost incurred by the customer in preparing or presenting that contention or recommendation.”

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

#### **IV. NOI to Claim Compensation**

Section 1804(a)(1) requires a customer who intends to seek an award of intervenor fees and expenses to file its NOI and serve a copy of its NOI on all parties to the proceeding within 30 days after the holding of a Prehearing Conference (PHC). A PHC on this matter was held on November 17, 2000. TURN timely filed its NOI on December 18, 2000 (the 30<sup>th</sup> day falling on a weekend) and served a copy of its NOI on all parties of record.

On February 6, 2001, the assigned Administrative Law Judge (ALJ) issued a ruling in response to TURN's NOI to claim compensation. The ALJ ruled that TURN's NOI was timely filed, that it was a customer as defined by § 1802(b), that it is eligible to claim compensation as a Category III customer,<sup>4</sup> and that a presumption of significant financial hardship existed for TURN in this proceeding.

#### **V. Requests for an Award of Compensation**

The final decision in the first phase of this proceeding was D.01-04-006, dated April 4, 2001. TURN's June 4, 2001 request for compensation was timely filed with the Docket Office, pursuant to § 1804(c).

#### **VI. Substantial Contribution**

A party may make a substantial contribution to a decision in one of several ways.<sup>5</sup> It may offer a factual or legal contention upon which the Commission relied in making a decision,<sup>6</sup> or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted.<sup>7</sup> A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.

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<sup>4</sup> A Category III customer is a representative of a group or organization formally organized with articles of incorporation or bylaws that authorizes the entity to represent the views of residential customers, membership of which includes residential ratepayers of the applicant. (See D.98-04-059.)

<sup>5</sup> Section 1802(h).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

TURN asserts that it made a substantial contribution to this proceeding in the direct load control, opt-out provision, and new program design issues. For example, it was the primary party advocating for expanding the direct load program. This advocacy encouraged the Commission to order PG&E and SDG&E to explore reasonable options for implementing air conditioning (A/C) cycling, and other electric motor interruption, programs targeted to residential and commercial customers, as noted on page 5 of D.01-04-006.

TURN supported a continuance of the suspension of the opt-out provision. TURN also recommended allowing customers to opt out based on public health and safety and recommended that customers pay one year's worth of rate discounts for being allowed to opt out. Although D.01-04-006 allowed customers to opt out without complicated conditions, it did require customers that chose to opt out retroactive to November of 2000 to repay the discounts received from that date to the present (D.01-04-006, Conclusion of Law 16, mimeo., p. 91).

TURN recommended that the new program incentives recommended by the certain "Joint Parties" be allowed only on an interim basis. TURN also recommended that additional requirements be imposed for the proposed Scheduled Load Reduction Program (SLRP), and that new interruptible programs exist only until December 2002. Although SLRP was not adopted, TURN pointed out that other new programs were approved only through December 31, 2002, and that customers who opt-out of any current interruptible program were prohibited from participating in any California Independent System Operator (ISO) or other interruptible programs with capacity payments for one year. (See, for example, D.01-04-006, Conclusions of Law 25 and 26 and Ordering Paragraph 17.)

TURN does not believe that its participation in this proceeding duplicated the showings of other parties. Although its positions on new program design may have overlapped with those of other parties in this proceeding, TURN suggests that no other party provided input from the perspective of potential costs and benefits to residential and small commercial ratepayers.

The decision did not adopt all of TURN's specific factual contentions, legal contentions, policy or procedural recommendations. However, the record does substantiate that TURN substantially contributed to D.01-04-006. TURN was instrumental in getting the Commission to order PG&E and SDG&E to explore reasonable options for implementing A/C cycling; requiring customers that got out of interruptible programs on a retroactive basis to repay the discounts they received from that date to the present; approving new interruptible programs only through December 31, 2002; and restructuring customers opting out of interruptible programs from participation in any other interruptible program with capacity payments for one year. TURN's participation was productive and did not duplicate that of any other party in this proceeding. TURN has satisfied the substantial contribution requirement.

## **VII. The Reasonableness of Requested Compensation**

TURN seeks \$32,082 in compensation for its participation in this proceeding, which is \$12,842 above its \$19,240 NOI budget for the first phase of this proceeding. TURN explained that its actual time spent in Phase I was substantially higher than its initial budget because of changed circumstances that required additional expenditures. For example, in response to the unprecedented series of Stage 3 alerts issued in January 2001, the Commission temporarily suspended penalty provisions and tolled the time and number

limitations on interruptions in D.01-01-056, resulting in added urgency on addressing how to modify existing programs. This was undertaken with the holding of three days of technical workshops not previously scheduled, and several rounds of comments and reply comments. The following tabulation summarizes TURN's compensation request for the first phase of this proceeding.

<b>Activity</b>	<b>Request</b>	<b>Budget</b>	<b>Request Over Budget</b>
Attorney Fees	\$16,900	\$11,240	\$5,660
Consulting Fees	11,766	7,000	4,766
Direct Expenses	3,416	1,000	2,416
Total Request	\$32,082	\$19,240	\$12,842

#### **A. Overall Benefits of Participation**

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that his or her participation was “productive,” as that term is used in § 1801.3.<sup>8</sup> In that decision, we discussed the requirement that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

Although TURN attempted to determine the numeric impact of its showing in this proceeding, it was not able to do so. This is because its participation in this proceeding related to issues in advance of program

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<sup>8</sup> For example, see D.98-04-058, mimeo., pp. 31-33, and Finding of Fact 42.

implementation and participation. For example, TURN succeeded in expanding the scope of the A/C cycling program. TURN also persuaded the Commission to double the credits for SCE's new A/C cycling program. Both of these changes will provide monetary benefits to residential ratepayers, but the amounts cannot be estimated with any accuracy in advance of program implementation and participation.

We find that the overall economic interests at stake in Phase I of this proceeding are so considerable that we are justified in accepting as adequate TURN's qualitative showing of productivity. We therefore find that the costs of TURN's participation are reasonable in relation to the benefits ratepayers realized through that participation.

### **B. Attorney's Fees**

TURN seeks compensation for its attorney Marcel Hawiger as follows.

	<b>Year</b>	<b>Hours</b>	<b>x</b>	<b>Rate</b>	<b>=</b>	<b>Amount</b>
Direct	2000	33.97		\$180		\$6,114
	2001	51.07		190		9,701
Indirect	2000	1.50		90		135
	2001	10.00		95		950
Total Attorney Fees						\$16,900

#### **1. Hours Claimed**

TURN maintained a detailed summary of time spent by Hawiger with hours broken down by date, activity, and description of work. A copy of this summary was attached to its request for an award of compensation. TURN's time records were further coded by activity or line item descriptions, where possible.



Work fundamental to active participation in a Commission proceeding not allocable by issue was classified as either “Gen” or “Base.” Time allocated as Gen represented general preparation time. Time allocated as Base represented time fundamental to the active participation of Hawiger in the proceeding and does not vary significantly in relation to the number of issues covered. This included the initial review of filings and pleadings, preparation of protests, attendance at the PHC, and an initial review of the proposed decision.

TURN allocated its direct attorney time to three major issues based on time slips and pleadings. This resulted in 30% of attorney time being allocated to direct load control, 50% to the opt-out provision, and 20% to program design issues. The following tabulation summarizes the direct time spent by Hawiger on these issues in this proceeding after a 10% voluntary reduction in attorney time spent in the direct load control and program design issues because the Commission did not adopt all of its recommendations in those areas.

<b>Issue</b>	<b>Hours</b>
Direct Load Control	24.16
Opt-Out Provision	44.76
Program Design	16.12
Total Hours	85.04

TURN also seeks recovery of 11.50 hours of “indirect time” spent by its attorney preparing a compensation request in this proceeding. (This time is compensated at 50% of the attorney’s hourly rate.) Indirect time consists of the time TURN spent preparing its NOI and compensation requests. Although the 11.5 hours of indirect time may appear excessive, this was a complex proceeding that involved a comparison of TURN’s work to that of a multitude of other

parties in order to substantiate its compensation request. Under these circumstances, 11.5 hours for preparing the NOI and compensation request is reasonable.

In light of TURN's substantial contribution to the final decision, TURN's compensation request for direct and indirect time is reasonable and should be granted. Although the time is more than originally budgeted, the additional time is reasonable in light of the work required for effective participation. TURN should be compensated for its 85.04 hours (33.97 hours in 2000 and 51.07 hours in 2001) of direct time and 11.50 (1.50 hours in 2000 and 10.00 hours in 2001) of indirect time spent on this proceeding.

## **2. Rates Claimed**

TURN seeks a \$180 hourly rate for the direct time that Hawiger spent on this proceeding in 2000 and a \$190 hourly rate for his direct time spent in 2001.<sup>9</sup> A \$ 90 hourly rate, half the 2000 requested hourly rate, and a \$95 hourly rate, half the 2001 requested hourly rate, is being requested by TURN for the time Hawiger spent preparing TURN's compensation request.

Section 1806 requires the computation of compensation to take into consideration the market rates paid to persons of comparable training and expertise offering similar services. The compensation awarded may not, in any

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<sup>9</sup> Although TURN acknowledged on page 13 of its compensation request that the Commission adopted a \$180 hourly rate for Hawiger for 2000 in D.01-03-030 and a \$185 hourly rate for Hawiger for 2000 in D.01-03-042, TURN has requested, also on page 13 of its compensation request, a \$190 hourly rate for Hawiger for the year 2000. Given that the detailed calculation of the requested award on Table 3 of the compensation request demonstrates a \$180 hourly rate was used for Hawiger in 2000 and a \$190 hourly rate for 2001, we must assume that the requested \$190 hourly rate for Hawiger for the year 2000 is intended to be for the year 2001.

case, exceed the comparable market rate for services paid by the Commission, or by the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.

The requested \$180 hourly rate for work performed by Hawiger in 2000 is the same hourly rate that was found reasonable for his work in 2000 by

D.01-03-030. However, D.01-03-042, a more recent decision, authorized Hawiger a \$185 hourly rate for his work in 2000 based on his experience, effectiveness, and rates paid other attorneys. Consistent with the most recent compensation award for Hawiger and considering his experience, effectiveness, and rates paid to other attorneys, a \$185 hourly rate is reasonable compensation for his professional services in 2000. TURN should be compensated \$6,284 (33.97 hours x \$185 an hour) for work performed by Hawiger in 2000.

TURN seeks an increase in the hourly rate of Hawiger for 2001 to \$190. Although TURN has not reviewed the 2000 *Of Counsel* Survey, it relied on the 1999 survey to substantiate its requested increase for Hawiger. That survey reported a range of rates for associates from \$100 to \$350 an hour. Excluding the outliers on each end, the average low-end rate was \$127 and the average high-end rate was \$239. Based on this information, TURN seeks to increase the hourly rate of Hawiger to \$190. A \$190 hourly rate for work performed by Hawiger in 2001 is reasonable considering his experience and rates paid to other attorneys with comparable training and experience. TURN should be compensated \$9,703 (51.05 hours x \$190 an hour) for work performed by Hawiger in 2001.

Consistent with our direction in D.98-04-059 to use half the hourly rate for time spent traveling and preparing a compensation request, TURN reduced the 2000 and 2001 requested hourly rate for Hawiger by half, to \$90 and \$95/hour respectively, for the 11.50 hours spent preparing its compensation request. Although we are following our direction in D.98-04-059 and using half the hourly rate for time spent preparing the compensation request, the requested hourly rate for 2000 is increased from \$90 to \$93 because we are granting Hawiger an hourly rate higher than requested by TURN. TURN should be

compensated \$1,089 (1.5 hours x \$93 an hour plus 10.0 hours x \$95 an hour) for the indirect work of Hawiger performed in 2000 and 2001.

### **C. Consultant's Fees**

TURN seeks \$11,766 for the consulting services of JBS Energy, Inc. (JBS) used by TURN for its work on the direct load control, opt-out provision, and new program design issues. JBS assigned W.B. Marcus and Jeff Nahigian to work with TURN on these issues, of which Nahigian performed the majority, as summarized in the following tabulation:

<b>Consultant</b>	<b>Hours</b>	<b>x</b>	<b>Rate</b>	<b>=</b>	<b>Amount</b>
Marcus	4.16		\$160		\$ 666
Nahigian	111.00		100		11,100
Total					\$11,766

The hourly rates requested for JBS consultants reflect the actual recorded or billed costs incurred by TURN to retain the services of JBS and are consistent with TURN's compensation request and detailed justification filed on April 6, 2001 related to D.01-01-060 in A.00-11-037.

The \$160 hourly rate being requested for Marcus represents a \$10 increase over his 1999 approved rate of \$150 an hour. Marcus graduated from Harvard College with an A.B. magna cum laude in economics in 1974, and received an M.A. in Economics from the University of Toronto in 1975. He has been directly involved in the field of energy policy and utility regulation for more than twenty years, first as an economist with the California Energy Commission and, since 1984, as a Principal Economist for JBS. In this position, he is the firm's lead economist for all utility issues and supervises the work of five other analysts.

The requested \$100 hourly rate for Nahigian is \$5 over his 1999 approved rate of \$95 an hour. Nahigian, a Senior Economist with JBS, has more than ten years experience analyzing utility operations and rate design issues. He received a B.S. in Environmental Policy Analysis and Planning for the University of California, Davis, in 1986. After a brief stint as a policy analyst for the Independent Energy Producers Association, Nahigian joined the JBS staff in 1987. His analysis served to provide the basis for much of the testimony Marcus has presented to the Commission in recent years.

The billing rates requested for each firm member are consistent with standard billing rates of JBS during the period when the work was performed. TURN asserts that the increase in hourly rates for Marcus and Nahigian represents a reasonable compensation level for their professional consulting services. TURN suggests that such an increase represents a reasonable compensation level for professional consulting services. One source of evidence provided by TURN was the market rates for expert witnesses presenting testimony to the Commission in other Commission proceedings. Several such examples were presented by TURN in its A.00-11-037 compensation request to substantiate that the requested hourly rates for Marcus and Nahigian are reasonable. We concur. A rate of \$160 per hour for Marcus and \$100 per hour for Nahigian's consulting services, considering their experience and rates paid other consultants, are reasonable. TURN should be compensated \$11,766 for the work its consultants performed in the first phase of this proceeding.

#### **D. Direct Expenses**

TURN seeks \$3,417 in compensation for direct expenses incurred as a result of its participation in this proceeding, as detailed in its compensation request. Approximately \$3,100 of the associated costs consisted of out-of-pocket

expenses for copies and postage. The remaining \$317 consisted of travel expenses and Lexis research.

The direct costs being requested by TURN, which represents less than 10.00% of its total compensation request, are reasonable. Given the substantial number of parties in this proceeding, there is no surprise in seeing that TURN's out-of-pocket expenses for copies and postage exceeded its NOI budgeted amount. TURN's direct expenses, with supporting documentation attached to its compensation request, are minor in relation to the total request. TURN has adequately substantiated its associated cost and should be compensated for the full \$3,417 of such costs.

#### **VIII. Summary of Compensation Award**

Consistent with § 1802(h), TURN is entitled to \$32,259 in compensation for its work in the first phase of this proceeding. The total amount awarded will be allocated among PG&E, SDG&E and SCE, based upon their respective 2000 retail sales of electricity measured in kilowatt-hours.

Consistent with prior decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate) commencing August 18, 2001 (i.e., the 75<sup>th</sup> day after TURN filed its compensation request), and continuing until the award is paid in full.

As in all intervenor compensation decisions, we put TURN on notice that the Commission staff may audit their records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. These records should identify specific issues for which they requested compensation, the actual time spent by each person, the applicable hourly rate, fees paid, and any other costs for which compensation has been claimed.

**Findings of Fact**

1. TURN filed a timely intervenor compensation request for its contribution to D.01-04-006.
2. A rebuttal presumption of significant financial hardship exists for TURN.



3. TURN has substantially contributed to D.01-04-006.
4. TURN maintained a detailed summary of time spent by its attorney and consultants in this proceeding.
5. D.01-03-042 found a rate of \$185 per hour to be reasonable compensation for attorney Hawiger's professional services in 2000 considering his experience, effectiveness, and rates paid other attorneys.
6. The \$190 hourly rate being approved for TURN's attorney for his work in 2001 is no greater than the market rate for individuals with comparable training and expertise.
7. Rates of \$160 per hour for Marcus and \$100 per hour for Nahigian are reasonable considering their consulting experience and rates paid other consultants.
8. The consultant costs incurred by TURN are reasonable.
9. Turn's hours spent in preparing its compensation request are reasonable.
10. The direct expenses incurred by TURN for out-of-pocket expenses for copies, postage, travel, and Lexis research are reasonable.

### **Conclusions of Law**

1. TURN has fulfilled the eligibility compensation requirements of Pub. Util. Code § 1801 *et seq.*
2. TURN should be awarded \$32,259 for its substantial contribution to D.01-04-006.
3. Respondents PG&E, SDG&E, and SCE should pay to TURN that pro rata portion of TURN's award equal to each utility's percentage of the sum of the retail kilowatt-hours of electricity sold by them in 2000.
4. Per Rule 77.7(f) (6), the Commission may waive the comment period for this compensation decision.

5. This order should be effective today so that TURN may be compensated without unnecessary delay.

## **O R D E R**

### **IT IS ORDERED** that:

1. The Utility Reform Network (TURN) is awarded \$32,259 in compensation for its substantial contribution in Decision (D.) 01-04-006.
2. Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company shall, within 30 days of this order, pay to TURN that pro rata portion of TURN's award equal to each utility's percentage of the sum of the retail kilowatt-hours of electricity sold by the three utilities in 2000, plus interest at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release, G.13, commencing August 18, 2001, and continuing until the full payment has been made.
3. The comment period for today's decision is waived.
4. Rulemaking 00-10-002 remains open to address Phase 2 of this proceeding.

This order is effective today.

Dated October 10, 2001, at San Francisco, California.

LORETTA M. LYNCH  
President  
HENRY M. DUQUE  
RICHARD A. BILAS  
CARL W. WOOD  
GEOFFREY F. BROWN  
Commissioners